

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:)	CASE NO. 03-92256-MGD
)	
NANCY FOWLER)	CHAPTER 7
)	
Debtor.)	

ORDER DISALLOWING AMENDED CLAIM NO. 4

On February 28, 2003, Nancy Fowler ("Debtor") filed a voluntary Chapter 7 petition before this Court. Prior to Debtor's bankruptcy, Debtor was a party and/or was alleged to have been involved in a number of lawsuits involving Our Loving Mother's Children, Inc. ("OLMC"). These matters specifically included:

George Collins v. Our Loving Mother's Children, Robert J. Hughes, Bernice A. Hughes and Jack Sweeney, Superior Court of Rockdale County, Georgia, Civil Action No. 99-CV-1961N; George Collins v. Our Loving Mother's Children and Robert J. Hughes, Superior Court of Rockdale County, Georgia, Civil Action No. 00-CV-2298N; Chris Merrifield and Little Drummer Boy Productions, Inc. v. OLMC and the Hughes, U.S.D.C., E.D. La., Civil Action No. 00-0864; Dr. Ramon Sanchez and Sherry Sanchez vs. Jack Sweeney and Ronald F. Tesoriero, Superior Court of DeKalb County, Georgia, Civil Action No. 01CV-2155-5; Dr. Ramon Sanchez and Sherry Sanchez vs. Jack Sweeney, Ronald F. Tesoriero and Robert J. Hughes, Superior Court of DeKalb County, Georgia, Civil Action

No. 02-CV-1987-5; Joseph Waitz v. Robert J. Hughes, St. Josephat Catholic Diocese, Bernice A. Hughes, Stephen H. DeBaun, Michael J. Powell, Jack Sweeney, and Ronald F. Tesoriero, U.S.D.C., N.D.Ga., Civil Action No. 1:01-CV-2668. During this period, it is also alleged by OLMC that Debtor and/or her supporters filed four Georgia State Bar complaints, three criminal complaints, and three state regulatory complaints, all of which were against OLMC or its attorneys. OLMC alleges these multiple proceedings were instituted by the Debtor and her supporters under a strategy of running up additional legal costs in order to extract a settlement for the Debtor. (Footnote 1, OLMC's Memorandum of Law As to Amended Claim Four.)

All of these lawsuits are hereinafter referred to as the "other litigation." In addition to the other litigation, Debtor and OLMC were parties to a specific lawsuit pending in Rockdale County, Georgia and styled Nancy Fowler v. Our Loving Mother's Children, Inc., et al., Rockdale County Superior Court, Civil Action File No. 99-cv-2358N (hereinafter "the Rockdale County litigation"). All of the other litigation had been closed and/or resolved prior to Debtor's bankruptcy and prior to the claims bar date in Debtor's Chapter 7 case.

On September 6, 2002, a Summary Judgment was entered in favor of OLMC and against Debtor in the Rockdale County litigation. Debtor appealed the ruling, but the ruling against Debtor and in favor of OLMC was upheld on appeal. The Georgia Court of Appeals affirmed the trial court on July 11, 2003, and the Georgia Supreme Court denied certiorari on November 10, 2003. Therefore, there was a final adjudication against Debtor and in favor of OLMC no later than November 10, 2003.

After the Court granted OLMC's Motion for Summary Judgment in the Rockdale County litigation, on or about October 21, 2002, OLMC filed a Motion for Sanctions against Debtor pursuant to O.C.G.A. § 9-15-14. A true and correct copy of that Motion for Sanctions is attached as Exhibit "A" to OLMC's Amended Proof of Claim. On June 25, 2003, this Court issued its Notice Fixing Time for Filing Proofs of Claim. Pursuant to the Notice, the deadline for filing proofs of claim in this matter was September 23, 2003.

On September 23, 2003, OLMC filed a Proof of Claim in this case, Claim No. 4, in the amount of "approx. \$1,000,000.00." The claim was signed by OLMC's counsel, Edmund James Novotny, Jr. ("Novotny"). As the "Basis for Claim" on the form, OLMC checked the box "Other" and inserted a "Claim for 9-15-14 Fees." The debt is claimed to have been incurred "1999 - present." In the

attachment to the claim, OLMC further clarified the basis for the claim. OLMC stated the following:

The Creditor has filed a motion for the award of attorneys fees against the Debtor in the Rockdale County Superior Court in a civil action captioned Nancy Fowler v. Our Loving Mother's Children, Inc., et al, Civil Action File No. 99-cv-2358N. The motion remains pending.

The basis for OLMC's asserted claim is specific and unambiguous. On February 8, 2005, Trustee filed his objection to OLMC's claims. On March 7, 2005, OLMC filed the following pleadings with this Court:

- a) a Motion for Relief from Stay to Litigate Their O.C.G.A. § 9-15-14 claim in Rockdale County; and
- b) its Amended Proof of Claim in the restated amount of \$722,482.57. (Docketed as Claim No. 9, but hereinafter referred to as Amended Claim No. 4)

This amended proof of claim was also signed by Novotny as counsel for OLMC.

In Paragraph 12 of OLMC's Motion for Relief from Stay, OLMC stated the following grounds in support of the Motion:

12. OLMC, as Respondent and Movant in this Motion to Lift Stay, shows that cause for modifying the stay may be found by the Bankruptcy Judge in the following factors which exist in support of OLMC's Motion:

- (a) Judge Nation is familiar with the many events and maneuvers occurring before him in the

Civil Action which generated the bulk of OLMC's fees and expenses which it seeks to recoup;

- (b) Counsel for OLMC and for the parties responding to the Motion are in place, and Judge Nation is familiar with those parties, their counsel and much of the conduct complained of by OLMC; Judge Nation may be in a better position to assay the conduct and credibility of parties appearing in his Court and may take judicial notice of any many filings and events occurring before him;
- © A hearing before Judge Nation would greatly reduce the time and expense as relates to proofs and arguments concerning OLMC's Motion and the defenses raised thereto, thus judicial economy would be promoted;
- (d) The claim is uniquely a state law claim created by the Georgia Legislature which grants Judge Nation jurisdiction to hear and determine all aspects of that state law claim; and
- (e) There will be no harm to the Debtor, nor delay to either the creditors or the administration of the estate. Judge Nation possesses special knowledge from his time invested in the case where the motion is pending, and he is able to resolve all issues pertaining to the claim and afford a complete relief to all parties, including non-bankruptcy third parties.

In the Memorandum of Law attached to OLMC's Amended Claim No. 4, in Footnote 1, OLMC identified all of the other litigation. The other litigation had concluded prior to Debtor's bankruptcy. OLMC does not allege that any motion for sanctions,

"claims" under O.C.G.A. § 51-7-80, or any other matter remained pending in the other litigation. It does not appear from the styles of the other litigation that Debtor was a named party in those actions.

OLMC's amended proof of claim was very specific as to the fees and expenses sought pursuant O.C.G.A. § 9-15-14 in the Rockdale County litigation. OLMC stated its amended claim for the precise amount of \$722,482.57.

Furthermore, in Section II of OLMC's Memorandum of Law as to Amended Claim 4, OLMC stated the following:

"On September 23, 2003, Creditor Our Loving Mother's Children, Inc., (hereinafter "OLMC") filed a Notice of Claim based on a pending Motion for Sanctions in the Rockdale Superior Court against the Debtor for frivolous litigation." In addition, OLMC specifically attached its Motion for Sanctions (in the Rockdale County litigation) as Exhibit "A" to its Amended Proof of Claim.

A hearing was held on March 22, 2005 on the Trustee's Objection to OLMC's claim and on OLMC's Motion for Relief from Stay. At the conclusion of the hearing, the Court granted, in part, OLMC's Motion. When the parties were unable to agree on the language of an Order memorializing the Court's oral ruling, OLMC filed a Motion for Entry of Proposed Order (Docket No. 63)

which included language acceptable to both parties and provisions relating to discovery as to which the parties did not agree. The Court held a hearing on September 1, 2005 and on September 6, 2005, this Court entered its Order granting OLMC's Motion for Relief From the Stay and allowing the sanctions claim to proceed in Rockdale Superior Court. In this Court's Order, a portion of which was submitted by counsel for OLMC [see Motion for Entry of Proposed Order (Docket No. 63)- proposed Order submitted by counsel for OLMC], the Court included the following language submitted by OLMC:

"If it is determined by the Superior Court of Rockdale County that OLMC does not have a valid claim against Ms. Fowler under O.C.G.A. § 9-15-14, the claim of OLMC is disallowed." (Emphasis added).

On November 11, 2005, OLMC's Motion for Sanctions came for hearing before the Honorable Sidney L. Nation, Sr. in the Rockdale County litigation. Judge Nation denied OLMC's Motion for Sanctions. This Court has reviewed the proposed Order submitted to Judge Nation by OLMC as well as the final Order actually entered by Judge Nation. The proposed Order submitted by OLMC is attached to these Findings of Facts and Conclusions of Law as Exhibit "A." The Order submitted by OLMC held that the

Rockdale Court had declined to accept the "reference"¹ and that the Motion for Sanctions was denied because the Rockdale Court lacked jurisdiction over same. Judge Nation did not sign the Order proposed by OLMC and instead signed the Order attached hereto as Exhibit "B." The Order signed by Judge Nation explicitly and directly denied OLMC's Motion on the merits. Furthermore, this Court has reviewed the transcript of the hearing before Judge Nation. The following are several of Judge Nation's comments from the transcript:

1. "this [that the messages would have to be interpreted] took this Court about two years or three years to reach that conclusion. A lot of hearings, a lot of trials . . . And now we are back again saying that even though it took that time and it was that much trouble and that much consternation to do it, to reach that conclusion, that she should have known from the outset that that was just frivolous and unfounded to take that position and sue somebody based on that . . . I may have raised it, but it took about three years to nudge the Court into that posture. And it is not an easy posture to take. This whole case is about religion. That is all it's about. I have some grave concerns about this matter . . . In substance, you are asking for attorney fees because she shouldn't have sued, because she should have known, so plainly based on the law that she couldn't win this case. (T-4,5).
2. "Well, she had a little bit of a claim. You know money was hauled off from out there in black garbage bags for years. It went somewhere. I don't know who got it. Still don't know who got it." (T-8).

¹ Counsel for OLMC used the term "reference" to describe this Court's grant of OLMC's Motion to Lift Stay to allow the Rockdale Court to proceed with the case which was already pending in that Court. This Court did not "refer" anything to the Rockdale Court.

3. "Nancy Fowler is a person uneducated in the law. She is not a lawyer. As far as I know, she has never had any legal training. Why should she - - if that is true, if your position is right, why should she pay? She depended on professional members of the bar for that advice, and her advice and her thought process is all wound up in religious whatever . . . If anybody owes any money, they [the attorneys] owe the money, not Ms. Fowler." (T-15).
4. "It wasn't that simple, counsel. It took this Court three years to get to the point to do that. And you are saying they should have done that before they filed the lawsuit and then looked her in the eye and said, we are sorry, you have no claim, even though you raised \$20,000,000.00 and these folks got it all. And there is just no way you can get in the courthouse door." (T-18).
5. "That's right. But until you get these things, and see what they are and they are massive. There are a lot of them. How can you make a determination? You are saying these attorneys should have had all this and examined this and looked at it and analyzed it before they ever filed a lawsuit?" (T-29).
6. "Draw an order. That's what I am saying. I have looked at the briefs. And I just think there is a time and place to end things." (T-33).
7. "The case is over. Take your medicine and swallow it and go home, as far as I am concerned. Send me the order." (T-37).

On December 16, 2005, Judge Nation entered his Order denying the Motion for Sanctions in full (Exhibit "B" attached). OLMC filed a Notice of Appeal as to Judge Nation's Order. However, the Notice of Appeal was dismissed; therefore, the Rockdale Court's December 16, 2005 Order is a final Order.

Pursuant to this Court's prior Order granting relief from stay to allow the matter to proceed in Rockdale County, and pursuant to Judge Nation's Order denying OLMC's O.C.G.A. § 9-15-14 claims, on May 3, 2006, the Trustee filed his Motion for the Entry of an Order to Disallow OLMC's claim. On June 20, 2006, OLMC filed its Response to Trustee's Motion, and in the Response, it asked this Court to do two things:

- a) reconsider its "referral" to the Superior Court of Rockdale County and "reconsider" OLMC's claim against Debtor; and
- b) allow OLMC to "amend" its proof of claim to include its alleged claims against Debtor pursuant to O.C.G.A. § 51-7-80 et seq.

The matter came for hearing before the Court on June 28, 2006. Based on the facts as set forth herein, the Court hereby states its conclusions of law:

THERE IS NO BASIS TO RECONSIDER THE SUPERIOR COURT ORDER

This Court will not reconsider its "referral," nor will it "reconsider" OLMC's claim against Debtor. OLMC sought relief from the stay (opposed by the Trustee) to litigate its O.C.G.A. § 9-15-14 claim in Rockdale County. As set forth in OLMC's Motion for Relief and this Court's Order granting relief, there

were numerous legal and practical reasons to allow Rockdale Court to hear and decide the state law claim. OLMC's amended claim alleged they spent in excess of \$720,000 in fees and costs related to the Rockdale County litigation. The trial judge in this matter was clearly more knowledgeable and familiar with the events and the activities in the Rockdale County litigation than this Court would have been in attempting to educate itself on facts and issues which were already known to the state court judge presiding over the matter. OLMC asserts several "problems" with the analysis and the ruling of the Rockdale County court. However, OLMC had the right to appeal these issues, and, in fact, did appeal the ruling. OLMC dismissed its appeal, and the Rockdale County ruling is now final. This Court has no jurisdiction to act as appellate tribunal to the Superior Court of Rockdale County. Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); In re Optical Technologies, Inc., 272 B.R. 771, 774 (Bankr. M.D. Fla. 2001). OLMC's O.C.G.A. § 9-15-14 claims have been denied, and this Court will not disturb nor "reconsider" that ruling.

OLMC'S "AMENDMENT" TO CLAIM

OLMC's original proof of claim in this case specifically stated it was a "claim for 9-15-14 fees" and that the claim

related to a "motion for the award of attorneys fees against the Debtor in the Rockdale County Superior Court in a civil action captioned Nancy Fowler v. Our Loving Mother's Children, Inc., et al., Civil Action File No. 99-cv-2358N. The motion remains pending." OLMC's Amended Claim changed the "approx. \$1 million" to the specific number of \$722,484.57, and included a Memorandum of Law which once again referenced its Motion for Sanctions in the Rockdale County Superior Court and also attached as Exhibit "A" the specific Motion for Sanctions pending in Rockdale County. OLMC now asserts that its original claim included not just a claim for O.C.G.A. § 9-15-14 damages against the Debtor but that the claim also included damages pursuant to O.C.G.A. § 51-7-80 et seq. Both the original claim and the amended claim filed by OLMC were specific as to § 9-15-14 damages. OLMC's attempt to assert a wholly different claim is belied by the specificity of the language OLMC chose.

Neither the Bankruptcy Code, nor the Bankruptcy Rules specifically address amendments to proofs of claim. Prior to the bar date leave to amend is freely given, but post-bar date amendments are closely scrutinized. See In re International Horizons, Inc., 751 F.2d 1213, 1216 (11th Cir. 1985); Integrated Resources, Inc. v. Ameritrust Co. National Association (In re Integrated Resources Inc.), 157 B.R. 66, 70 (S.D.N.Y. 1993).

Courts have developed a two part test for deciding when to allow such amendments. E.g., In re Integrated Resources Inc., 157 B.R. at 70. First, the court must determine whether the amendment is actually a new claim, which would be prohibited by the bar date, under the guise of an amendment. Id. If the amendment is not a new claim, the court must determine whether allowing the amendment would be equitable based on the facts of the case. Id.

Many of the cases analyzing attempts to amend claims after the bar date involve tax authorities seeking to add claims for different tax years or different types of taxes. One case with more comparable facts, In re Big Rivers Electric Corp., provides a worthwhile comparison. 1998 U.S. Dist. LEXIS 23011 (W.D. Ky. Sep. 25, 1998). In Big Rivers, the original proof of claim described the basis for the claim as money owed under a marketing agreement with the debtor for one partial month which was due shortly pre-petition, but had never been paid. The claim form also noted that the creditor reserved the right to amend the claim if it determined additional amounts were owed.

Later, after the bar date, the creditor filed amendments to the claim for monies owed under the marketing agreement because the debtor had used an incorrect formula and underpaid the creditors for other periods of time. Despite the fact that the claims all arose from the same contract, the district court

upheld the bankruptcy court's refusal to allow the amendments. Although recognizing the "reasonable relationship" analysis of amendments and original claims, the Court found that these amendments were new claims because the original claim was "specifically limited by its own language." The Court rejected the creditor's argument that the original claim covered any other amounts under the marketing agreement. Id. at *11. Additionally, the Court considered that all of the documentation attached to the original claim referred only to the amounts owed that had never been paid. There was nothing in the documentation about other potential claims. Id. at **14-15.

Similarly, in this case, OLMC used very specific language in its original proof of claim, naming only "Claim for 9-15-14 Fees" on the form. OLMC's claim did not even contain the broader language included in the claim in Big Rivers, purporting to reserve the right to amend the claim, which language the Court found ineffective. OLMC's March 2005 amendment to the original claim, on its face, names "Motion for Sanctions" as the basis for the claim. The Motion for Sanctions was attached to this amendment (Exhibit "A" to the Amendment), along with a "Memorandum of Law as to Claim Four (4)." The nine page memorandum argues OLMC's § 9-15-14 cause of action. Again there is no mention whatsoever of any potential claim under § 51-7-80.

Moreover, OLMC's documentation discussed only § 9-15-14 claims. The only documentation attached to the original September 23 claim is a brief note stating that OLMC had filed a motion for the award of attorneys fees in Rockdale County, and that the voluminous documentary materials could be made available for inspection. Although the Motion was not attached to the original proof of claim, the original claim specially referenced § 9-15-14 and the only Motion which remained pending in the Rockdale County Litigation was the Motion for Sanctions pursuant to O.C.G.A. § 9-15-14. Thus, the Court concludes that a claim under O.C.G.A. § 51-7-80 is a new claim, and as such is subject to the claims bar date and should be disallowed as untimely.

Even if OLMC's supposed § 51-7-80 claim is treated as an amendment to the original claim, it should still be disallowed. The standard for amending proofs of claim is derived from Bankruptcy Rule 7015 and by reference, Federal Rule of Civil Procedure 15. The language in Rule 15 that leave to amend should be "freely given," however, "plays no role after the bar date." In re Plunkett, 82 F.3d 738, 740 (7th Cir. 1996). Allowing a post-bar date amendment is within the sound discretion of the court. In re International Horizons, Inc., 751 F.2d 1213. In determining whether to allow an amendment courts have considered the following equitable factors: (1) undue prejudice to the

opposing party; (2) bad faith or dilatory behavior on the part of the claimant; (3) whether other creditors would receive a windfall were the amendment not allowed; (4) whether other claimants might be harmed or prejudiced; and (5) the justification for the inability to file the amended claim at the time the original claim was filed. In re International Horizons, Inc., 751 F.2d at 1218; In re Enron Corp., 328 B.R. 75, 78 (Bankr. S.D.N.Y. 2005); In re Integrated Resources, Inc., 157 B.R. at 70.

The facts in Big Rivers are again informative. The Court in that case also considered the fact that the creditor had filed its amendments seven months after the bar date, and three months after confirmation of the debtor's reorganization plan. The Court concluded that the creditor was "dilatory in its efforts to inform the bankruptcy court and estate that it may have additional claims pertaining to the marketing agreement." 1998 U.S. Dist. LEXIS 23011 at *18. These dilatory actions "tilt[ed] the equitable scale toward denying the amendments." Id. at *17. In this case, OLMC is attempting to amend its proof of claim more than two years after the bar date, and almost two years after the debtor was granted her discharge. Like the creditor in Big Rivers, OLMC "watched these milestones come and go without taking any action." This equitable factor alone supports the

disallowance of the proposed amendment. See also In re Stavriotis, 977 F.2d 1202, 1205-1206 (7th Cir. 1992) (upholding bankruptcy court's refusal to allow IRS to amend proof of claim post-bar date to add additional tax year liability considering fact that creditors had no notice it had potential additional claims and IRS had no excuse for delay). Additionally, the Trustee relied on the claim basis and amount in the original proof of claim (and its first amendment). Further, OLMC has presented no excuse or justification for its delay in notifying the court and other creditors of this potential amendment.

OLMC claims that its § 51-7-80 claim "has only recently ripened." OLMC's Resp. to Trustee's Mot. For the Entry of an Ord. Disallowing Claim ("OLMC Response") at 12. This argument is not well taken. A claim in a bankruptcy case includes any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed. . . ." 11 U.S.C. § 101(5) (A) (Emphasis added). OLMC should have notified all involved that it anticipated § 51-7-80 claim at the time it made its original claim. Furthermore, OLMC's § 51-7-80 claim was ripe for adjudication when OLMC's summary judgment against debtor was upheld on appeal. The Supreme Court of Georgia denied Debtor's request for certiorari on her appeal on November 10, 2003 -

almost three years ago. OLMC could have long since "amended" its claim to assert § 51-7-80.

The purpose of permitting amendments is to "enable a party to assert matters that were overlooked or were unknown to him at the time he interposed his original [claim]." Wright & Miller, Federal Practice and Procedure § 1473 (1971). This often occurs, for example, where a party obtains new information in discovery. OLMC has unambiguously admitted that it knew about a potential § 51-7-80 claim when its original claim was filed by arguing that its original \$1 million claim was meant to include damages under § 9-15-14 and § 51-7-80. OLMC Response at 14. OLMC cannot use Rule 15 as a "back-door route" to secure bar-date extensions. Were the rule otherwise, a party could effectively help itself to automatic extensions of the bar date without seeking leave of the court." Stavriotis, 977 F.2d at 1206. "The bankruptcy court's need for prompt resolution of disputes necessitates a bar date for filing proofs of claim." Id. If OLMC knew, after analyzing information in its control that it was going to later seek to amend its claim, "it must not [have kept] that knowledge secret." Id. at 1206-1207.

OLMC's purported § 51-7-80 claim is disallowed as a late-filed new claim. Alternatively, the amendment to the original claim is denied on equitable grounds.

**OLMC'S CLAIM PURSUANT TO O.C.G.A. § 51-7-80 IS BARRED BY THE
SUPERIOR COURT'S RULING ON OLMC'S O.C.G.A. § 9-15-14 CLAIMS**

OLMC first asserted a claim pursuant to O.C.G.A. § 9-15-14.

Said code section states as follows:

- (a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.
- (b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

O.C.G.A. § 9-15-14 (Michie 2000 & Supp. 2005) (Emphasis added).

Section 9-15-14(a) mandates the award of attorney's fees where the court finds "a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept. . . ." Section 9-15-14(b) allows a court to assess fees for a broader range of behavior, including a determination that a position "lacked substantial justification."

The Court clearly rejected OLMC's Motion for Sanctions under either § 9-15-14(a) or (b). This Court's review of the transcript from the hearing as well as the proposed Order submitted by OLMC leads this Court to the conclusion that Judge Nation did not believe that Debtor's claims against OLMC lacked any justiciable issue of law or fact or any substantial justification. Now, OLMC seeks to "amend" its claims to assert claims pursuant to O.C.G.A. § 51-7-80 et seq. In order to prove its claims against Debtor pursuant to § 51-7-80 et seq., OLMC must prove the following:

Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation if such person acts:

- (1) with malice; and
- (2) without substantial justification.

O.C.G.A. § 51-7-81 (Michie 2000 & Supp. 2005) (Emphasis added)

Furthermore, in order for OLMC to prevail on a claim pursuant to O.C.G.A. § 51-7-80, OLMC is bound by any ruling of the Rockdale County Superior Court with regard to O.C.G.A. § 9-15-14 issues.

No motion filed under Code Section 9-15-14 shall preclude the filing of an action under this article for damages other than costs and expenses of litigation and reasonable attorney's fees. Any ruling under Code Section 9-15-14 is conclusive as to issues resolved therein.

O.C.G.A. § 51-7-83© (Michie 2000 & Supp. 2005) (Emphasis added).

Judge Nation's December 16, 2005 Order and the transcript from the hearing convince this Court that the issues of "complete absence of any justiciable issue of law or fact" and "substantial justification "were actually litigated and decided adversely" to OLMC. For that reason, OLMC would be collaterally estopped from attempting to re-litigate "without substantial justification" in this Court. See generally, In re Bilzerian, 100 F.3d 886, 892(11th Cir. 1996); In re Bush, 62 F.3d 1319 (11th Cir. 1995).

Finally, to assert a claim under § 51-7-80, OLMC was required to bring its claim "within one year of the date of final termination." O.C.G.A. § 51-7-84(b) (Michie 2000 & Supp. 2005).

OLMC's § 51-7-80 claims are not timely. OLMC's Motion for Summary Judgment against Debtor was granted in the Rockdale

County litigation on September 6, 2002. Debtor's appeal of this ruling was denied by the Georgia Appellate Court on July 11, 2003, and the Supreme Court of Georgia denied certiorari on November 10, 2003. The affirmation of the ruling against Debtor was a final termination of all claims by Debtor in favor of OLMC. OLMC did not seek to amend its proof of claim until June 20, 2006, well after one year of the date of the final termination of all claims by Debtor in favor of OLMC and against Debtor. OLMC's "amendment" is not timely.

IT IS THEREFORE ORDERED that OLMC's claim No. 4 As Amended is hereby **DISALLOWED**.

SO ORDERED this _____ day of _____, 2006.

MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

Parties to be Served:

W. Russell Patterson, Jr.
Ragsdale, Beals, Hooper & Seigler LLP
2400 International Tower Peachtree Center
229 Peachtree Street, N.E.
Atlanta, GA 30303-1629

Edwin K. Palmer, P.C.
118 East Trinity Place, Suite 9
Decatur, GA 30030

C. David Butler
Shapiro Fussell
One Midtown Plaza
Suite 1200, 1360 Peachtree Street
Atlanta, GA 30309

Charles R. Bridgers
Delong, Caldwell & Bridgers
3100 Centennial Tower
101 Marietta Street, N.W.
Atlanta, GA 30303-2731

Edmund J. Novotny, Jr.
Michael C. Powell
Baker, Donelson, Bearman, Caldwell
& Berkowitz, PC
5 Concourse Parkway, Suite 900
Atlanta, Georgia 30328

Ernest V. Harris
Harris & Liken, L.L.P.
1045 South Milledge Ave.
Suite 200
P. O. Box 1586
Athens, GA 30603